ORAL ARGUMENT NOT YET SCHEDULED
NOS. 15-1112 & 15-1209

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,
Petitioner/Cross-Respondent,

and

THE NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA, LOCAL 11 AND THE NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31
Intervenors

vs.

CNN AMERICA, INC.,
Respondent/Cross-Petitioner.

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ON CROSS-PETITIONS FROM AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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# JOINT *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER BY CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, INTERNATIONAL FRANCHISE ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL ASSOCIATION OF MANUFACTURERS AND NATIONAL RESTAURANT ASSOCIATION

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Circuit Rules 26.1 and 29, the Joint *Amici Curiae* hereby certify that they are trade associations and each of their general purposes includes the objective of preserving and protecting the rights of employers under the National Labor Relations Act. The specific purposes of each of the *Amici* are set forth below in the section of this brief entitled, "Identity and Interests of the *Amici*."

The Joint *Amici* hereby certify that none of them have any outstanding shares or debt securities in the hands of the public. They further certify that none of them has any parent companies, nor does any publicly held company have a 10% or greater ownership interest in any of the *Amici*. [1]

[1] All parties have consented to the filing of this *amici* brief. No party, party's counsel, or person other than the *Amici*, their members, and their counsel, has: (1) authored this brief in whole or in part or (2) contributed money that was intended to fund preparing or submitting the brief.

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## IDENTITY AND INTERESTS OF THE *AMICI*

The following Joint *Amici*, collectively representing millions of employers and virtually every industry covered by the National Labor Relations Act (NLRA), received the consent of all parties to file this *amicus* brief in support of the Petitioner, CNN America, Inc. (CNN).

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every business sector and from every region of the country, many of whom are covered by the NLRA. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases involving issues of concern to the nation's business community.

The Coalition for a Democratic Workplace consists of over 600 member organizations and employers, who in turn represent millions of additional employers, the vast majority covered by the NLRA or represent organizations covered by the NLRA.

National Federation of Independent Business is the nation's leading small business association representing 325,000 small and independent businesses and

advocating the views of its members in Washington and all 50 state capitals. NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

The International Franchise Association is the oldest and largest trade association in the world devoted to representing the interests of franchising. Its membership includes franchisors, franchisees and suppliers. The IFA's mission is to protect, enhance and promote franchising through government relations, public relations and educational programs, on a broad range of legislative, regulatory and legal issues that affect franchising. IFA's membership currently spans more than 300 different industries, including more than 11,000 franchisee, 1,100 franchisor and 575 supplier members nationwide.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The National Restaurant Association is the leading business association for the restaurant and foodservice industry. The Association's mission is to help members build customer loyalty, rewarding careers, and financial success. Nationally, the industry is made up of one million restaurant and foodservice outlets employing fourteen million people—about ten percent of the American workforce. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer.

All of the above referenced organizations have joined together in this brief to make the Court aware that the Board's decision in this case represents a significant unexplained departure from the Board's longstanding precedent on the issue of joint employer status. By retroactively imposing a joint employer finding on CNN, under circumstances which have long been held not to justify such a finding, the Board has in effect created a new, but unacknowledged standard that threatens many other businesses and industries with significant burdens and uncertainties, and is contrary to the intent of Congress. The Board's joint employer finding is arbitrary and capricious and should be denied enforcement.[3]

[3] The Joint *Amici* fully support the additional grounds for review set forth in CNN's brief. However, this *amici* brief will focus exclusively on the joint employer issue, which is of greatest concern to the broader business community represented by the Joint *Amici*.

## ARGUMENT

### I. INTRODUCTION

For over thirty years prior to this case, the NLRB found separate businesses to be joint employers only when they shared direct and immediate control over essential terms and conditions of employment of a group of employees. In the present case under review, without explicitly overruling any of its longstanding precedent, the Board has infused new "indirect" control factors into its decision, including contract authority to reimburse overall labor costs, routine supervision, and additional factors, in order to find CNN a joint employer. The result is that CNN now faces extensive liability for charges filed on behalf of employees of another separate and independent company. This outcome is inconsistent with previously settled principles of law and threatens the entire business community with similar arbitrary actions jeopardizing longstanding business relationships.

In this brief, the Joint *Amici* will seek to avoid repeating the detailed factual arguments of CNN's brief and will focus instead on the unexplained departures from the Board's own precedent and Congressional intent evidenced in the Board's decision. The *Amici* will further advise the Court of the significant adverse impact that this ruling, if upheld, would have on business-to-business relationships generally.

## II. THE BOARD'S DECISION, FINDING CNN TO BE A JOINT EMPLOYER, DEPARTS WITHOUT EXPLANATION FROM LONGSTANDING BOARD PRECEDENT.

Since at least 1984, the Board has held that a joint employer relationship exists only when the separate entities "share or co-determine" the essential employment conditions of one company's employees. *TLI, Inc.,* 271 N.L.R.B. 798 (1984), *enf'd.* 772 F.2d 894 (3d Cir. 1985); *Laerco Transportation,* 269 N.L.R.B. 324 (1984); see also *Flagstaff Medical Center,* 357 N.L.R.B. No. 65 (2011) *enf'd.in relevant part* 715 F.3d 928 (D.C. Cir. 2013); *N.L.R.B. v. Browning-Ferris Industries, Inc.,* 691 F.2d 1117, 1122 (3d Cir. 1982).

To establish this joint employer relationship, the evidence (until now) was required to demonstrate that the co-determination "meaningfully affects matters related to the employment relationship, such as hiring, firing, discipline, supervision and direction." *TLI Inc.,* 271 N.L.R.B. at 798-99. The Board further declared that codetermination requires the alleged joint employer to have both the right to control the labor relations policies of the other employer and to have actually exercised direct control over the other employer's employees. *Airborne Express*, 338 N.L.R.B. 597, 597, n.1 (2002).

In the present case under review, the Board majority has departed from the foregoing actual, direct control standard and relied on indirect control factors previously deemed insufficient to establish joint employment. The Board

concluded that CNN controlled the "hiring, supervision, and direction" of the subcontractor's employees based on such commonplace factors as merely setting terms in its labor agreement for staffing levels, reimbursements and training costs. The Board further placed undue reliance on CNN's limited and routine direction of work, and limited supervision to resolve problems and address emergencies, as a factor in determining joint employment. The Board also considered "additional factors," including that TVS employees worked in CNN facilities, sometimes wore CNN badges and carried CNN press credentials, used some CNN equipment, and performed work integral to CNN's business. Although these factors exist in almost every labor staffing agreement, and despite the lack of any evidence of CNN's actual control over hiring, firing, discipline, supervision and direction of TVS' employees, the Board found these indirect factors established joint employment.

The Board majority failed to acknowledge its imposition of a new joint employer test in this case. Instead, in a footnote in its decision, the Board criticized three decades of its own precedent requiring direct and immediate control, but did not overrule that precedent. (Dec. at 3, n.7). [4]

In his dissent from the joint employer holding, Member Miscimarra

[4] In August 2015, the Board explicitly changed its joint employer standard. *See Browning-Ferris*, 362 N.L.R.B. No. 186, slip op. at 2-3 (2015), expressly rejecting for the first time the requirement that the joint employer's control be direct and immediate and overruling such cases as *TLI* and *Airborne Express*. The present decision under review was issued before *Browning-Ferris* was decided, however, and the Board's new standard is not properly before this Court on review.

highlighted the majority's unexplained abandonment of the longstanding test for joint employer status. (Dec. at 31 (Member Miscimarra, dissenting in part)). He noted that the majority "concede[d] that CNN had no direct role in hiring, firing, disciplining, discharging, promoting, or evaluating employees and that CNN did not actively codetermine the TVS technicians' other terms and conditions of employment." (Dec. at 31). Instead, the Board held CNN to be a joint employer because "CNN ostensibly exercised indirect influence." *Id.* The Board thereby imposed a new joint employer standard without explaining or justifying the departure from its prior holdings.

It is well settled in this Court that the Board cannot depart from its own relevant precedent, without explaining why such precedent is not controlling. *Randell Warehouse of Arizona, Inc. v. N.L.R.B.,* 252 F.3d 445, 448 (D.C. Cir. 2001). The Board's decision here should therefore be set aside upon a finding that it departed from established precedent without a reasoned justification. *Titanium Metals Corp. v. N.L.R.B.,* 392 F.3d 439, 446 (D.C. Cir. 2004); *E.I. Du Pont De Nemours & Co. v. N.L.R.B.,* 682 F.3d 65, 66 (D.C. Cir. 2012). Such a finding is unavoidable here, as is further demonstrated below with respect to the specifically stated grounds for the Board's decision here.

### A. The Board's Decision Misapplied Factors Traditionally Demonstrating Lack of Joint Employer Status.

Among the several specific departures from precedent that are more fully

detailed in Petitioner's brief, the following are particularly worthy of amplification here as they are inconsistent with the general requirement of direct and immediate control:

First, contrary to the majority's finding against CNN, the Board has not previously viewed a cost-plus labor agreement as evidence of joint employment. *Laerco Transportation,* 269 N.L.R.B. 324 (1984); *John Breuner Co.*, 248 N.L.R.B. 983, 988-89 (1980) (holding that the existence of a cost-plus contract does not create an inference of a joint employer relationship. *See also International House* v. *N.L.R.B.*, 676 F.2d 906, 914 (2d Cir. 1982). Cost plus contracts are common in each of the industries represented by the Joint *Amici*, and merely insure a satisfactory work product at a certain cost, protecting against unnecessary charges, while giving the subcontractor a profit. These contracts do not in and of themselves establish the type of control that establishes a joint employer relationship. *Int'l Chem. Workers Union Local 483 v. N. L. R. B.,* 561 F.2d 253, 257 (D.C. Cir. 1977); *Goodyear Tire & Rubber Co.*, 312 N.L.R.B. 674, 678 (1993); *Airborne Express*, 338 N.L.R.B. at 606; *Hychem Constructors*, *Inc.,* 169 N.L.R.B. 274, 276 n.4 (1968); *Pitney Bowes, Inc.,* 312 N.L.R.B. 386, 387 (1993). Nothing in CNN's agreement with TVS setting an annual increase on contractual payments for labor established that CNN controlled TVS employees' wages.

The Board further departed from its own precedent in finding that CNN

controlled TVS employees' overtime because it required the use of part-time employees to provide coverage on a 24 hour a day, 7 day a week basis, which effectively limited full-time employee overtime. (Dec. at 3). The Board had previously recognized that such controls are part of the company's right to police reimbursable expenses under its cost-plus contract and did not warrant the conclusion of a joint employment relationship. *Hychem Constructors, Inc.,* 169 N.L.R.B. at 276. The Board has only found a joint employer relationship if the "user" company reserved an explicit right to set or approve changes in employee compensation. *See Continental Group, Inc.*, 353 N.L.R.B. 348, 356 (2008) *vacated on other grounds*, Nos. 08-1328 & 08-1359, 2010 WL 5783085 (D.C. Cir. Sept. 20, 2010); *D&F Industries*, 339 N.L.R.B. 618, 628 (2003). No evidence established that CNN retained the right to approve wages or salary adjustments outside its limited right to control overtime costs. Accordingly, the overtime factors relied on by the Board should have failed to establish joint employment under the Board's own precedent.

Yet another unexplained departure from precedent occurred when the Board asserted that TVS' occasional consultation with CNN regarding union bargaining proposals supported a joint employer finding because it established CNN's control over employee compensation. To the contrary, the Board has not found that discussion of economic terms during collective bargaining confers joint employer

status. By contrast, in *TLI,* the Board reversed the administrative law judge's finding that wages and other economic benefits were under the contractor's control due to its participation in bargaining sessions. *TLI, Inc.,* 271 N.L.R.B. at 799. The Board found no joint employer status without evidence that the company required specific reductions or made particular proposals. Even when alleged joint companies have an agreement to reopen their staffing contract to discuss cost increases as a result of collective bargaining, the Board has not found that the prime company has the right to control the wages of the subcontractor's employees sufficient to establish joint employment. *Airborne Express,* 338 N.L.R.B. at 606. *See also Southern California Gas Co,* 302 N.L.R.B. at 461 (finding no joint employment when union and subcontractor negotiated all employees' terms and conditions of employment, and the union and prime contractor never met).

The present Board decision further departed from longstanding Board precedent by ignoring the absence of CNN's control over the hiring of TVS employees. The Board had previously held that the putative joint employer must actually participate in hiring or disapprove hiring decisions. See *Marcus Management*, 292 N.L.R.B. 251, 260 (1989); *Dunkin' Donuts Mid-Atlantic Distribution Ctr., Inc. v. N.L.R.B.,* 363 F.3d 437, 440 (D.C. Cir. 2004). The Board finds no joint employment when the subcontractor conducts its own job interviews, and makes separate hiring decisions, without the contractor's input. *G. Wes Ltd.*

*Co.*, 309 N.L.R.B. 225, 225 (1992); *Pitney Bowes, Inc.*, 312 N.L.R.B. at 386.

Here, the Board conceded that "TVS decided who to hire," but then used the fact that CNN's contract contained a reservation of "potential" authority to prohibit TVS from hiring technicians who worked for CNN's competitors to find that CNN controlled hiring. (Dec. at 3-4). However, the Board has previously held that a contractual provision giving a company the right to approve hires, standing alone, is insufficient to show the existence of a joint employer relationship. *Am Prop. Holding Corp.,* 350 N.L.R.B. 998, 1000 (2007) *enf'd in relevant part SEIU Local 32BJ v. N.L.R.B.,* 647 F.3d 435, 442 (2d Cir. 2011).[5] The Board has only found joint employment when the contractor has actually exercised the power to reject subcontractor hires, which was nowhere evidenced in this case. *Holyoke Visiting Nurses Ass'n v. N.L.R.B.,* 11 F.3d 302, 306 (1st Cir. 1993).

Similarly, under long-standing Board precedent, a contractor's determination of staffing requirements was previously insufficient to support a finding of joint employer status. *Southern California Gas Co.,* 302 N.L.R.B. at 461-462. As the Board previously recognized, allowing a company to set overall staffing levels for its subcontractor labor service company is critical to preserving the business relationship. Only the user company can predict its own production needs. In this

[5] This case was also overruled by the Board in *Browning Ferris,* but remained good law at the time of the *CNN* decision. *Browning-Ferris Indus. of California, Inc.,* 362 NLRB No. 186 (2015).

case, the record confirms the normal mechanics of a user-company and labor staffing company relationship, which should not have led to a joint employer finding.

The Board departed from its own precedent yet again in finding that CNN maintained a "pervasive involvement in the assignment of work." (Dec. at 5). As explained in CNN's brief, CNN identified stories it wished to cover; and TVS assigned the employees needed to cover those stories pursuant to its staffing contract. Moreover, TVS and not CNN provided daily on-site supervision of its own employees. The limited and routine supervision exercised by CNN, without any ability to hire, fire, or discipline, did not (until now) justify a joint employer finding under the Board's own precedent. *TLI, Inc.,* 271 N.L.R.B. at 799. *See also Pitney Bowes, Inc.,* 312 N.L.R.B. at 387 (relaying routine instructions, or alerting to problems that may arise during the day, does not indicate joint employment); *Flagstaff Medical Center,* 357 N.L.R.B. No. 65, slip op. at 13 (no joint employer relationship where general supervision consisted of what work to perform, or where and when to perform the work, but not how to perform it).

The Board has also consistently found no joint employer status, even if the contractor provides limited onsite daily supervision, when employees are highly trained workers. If an employee is trained, they know how to do the job before they start working. Supervision is limited and routine because there is no need to

instruct trained employees "specifically how to do the work or the manner in which they were to perform the assigned tasks." *G. West Ltd. Co.*, 309 N.L.R.B. at 26. Occasional involvement in employee work assignments to resolve problem situations, when there is no day-to-day control, has not previously established sufficient control over supervision to establish joint employment. *AT&T v. N.L.R.B.,* 67 F.3d 446, 451 (2d Cir. 1995).

Likewise, occasional assignment of duties did not previously establish joint employment. *Pitney Bowes, Inc.,* 312 N.L.R.B. at 387. For this reason, CNN's occasional requests for particular technicians to be assigned tasks did not rise to the level of control over job assignments required to establish joint employment under previous Board law. Limited amounts of control, which arise only when there is a problem with the services provided, was also not formerly sufficient to justify a finding of joint employment. *AT&T v. N.L.R.B.*, 67 F.3d at 452. The Board has also found that occasional requests to remove an employee from a job assignment do not establish joint employment. *Laerco,* 269 N.L.R.B. at 324, 326. The Board has even concluded that no joint employer relationship exists when the contractor made recommendations to its subcontractor about who to fire. *Flagstaff Medical Center,* 357 N.L.R.B. No. 65, slip op. at 13; *AM Property Holding Corp.,* 350 N.L.R.B. at 1000-01 (finding that no joint employer relationship existed even though alleged joint employer removed employee in the bargaining unit from his

position). Similarly, even limited authority to give oral and written reprimands has not been enough to establish joint employment. *Lee Hospital,* 300 N.L.R.B. 947, 949 (1990) *overruled on other grounds M.B. Sturgis,* 331 N.L.R.B. 1298 (2000).

### B. The Additional Factors Considered by the Board Here Were Beyond the Scope of the Traditional Joint Employer Test

As noted in Petitioner's brief, the Board listed several "additional factors" as "support" for CNN's joint employer liability. (Dec. at 7). These factors included CNN providing TVS managers with office space (to ensure on site supervision), providing some TVS technicians with email accounts, supplying all equipment that TVS employees used, TVS employees performing work integral to CNN's business, and CNN on some occasions holding out TVS' employees as its own for the limited purposes of obtaining security clearances and press passes. Under the joint employer test in effect at the time of the Board's decision, however, these factors should have been irrelevant to determining CNN's direct and immediate control over TVS employees' terms and conditions of employment. *Airborne Express,* 338 N.L.R.B. at 606. The critical question should have been whether the companies chose to handle jointly the "important aspects" of the employer-employee relationship. *N.L.R.B. v. Browning-Ferris Industries,* 691 F.2d at 1122. Those important aspects were previously defined by the Board as consisting of "hiring, firing, discipline, supervision and direction." *TLI, Inc.,* 271 N.L.R.B. at 798.

The Board's recitation of the above referenced "additional" secondary factors showcases its reliance on peripheral indirect evidence to establish joint employer liability, contrary to the Board's own precedent. The Board's decision has essentially made companies jointly liable for another business's practices anytime there is a contractual relationship, based upon incidental and unavoidable interaction between the companies. This approach exceeded the intention of the previous joint employer standard to impose liability only when both employers codetermine the essential employment conditions. *Browning-Ferris Industries, Inc.,* 691 F.2d at 1123.

## III. THE BOARD'S FAILURE TO ADHERE TO ITS OWN PRECEDENT APPLYING THE JOINT EMPLOYER STANDARD IN THIS CASE VIOLATES CONGRESSIONAL INTENT, AS EXPRESSED IN THE TAFT-HARTLEY AMENDMENTS TO THE NLRA.

Subcontracting, outsourcing, and temporary and contingent employment existed before the passage of the NLRA, and certainly were commonplace when Congress limited the definition of "employer" in the Taft-Hartley amendments of 1947. The legislative history of those amendments indicates that Congress, in amending the definition of employer, was responding to the previous Labor Board's expansive interpretation of the original definition, under which employers had been held responsible for the acts of others beyond common law principles of agency. Significantly, the Supreme Court initially upheld the Board's overbroad "economic reality" analysis to determine the scope of the employment relationship

under the NLRA, in *N.L.R.B. v. Hearst Publications,* 322 U.S. 111 (1944), Congress expressly overruled the Board and the Court. H.R. No. 510, 80th Cong., 1st Sess. (1947), *reprinted in* 1947 U.S. Code Cong. Service 1135, 1138. Congress also explicitly stated that the scope of the employer-employee relationship should not be construed as broader than that at common law. S.Rep. No. 1255, 80th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S. Code Cong. Service 1752, 1753.

Since then, the Supreme Court has held that the Board is not vested with the "general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). The Board cannot determine that a particular employer has "too much power." *Id.* Such a decision stretches the Board's authority far beyond protecting collective bargaining rights. The Board is not vested with the "general authority to define national labor policy by balancing the competing interests" of different business enterprises. *Id.* The ruling in this case violates these precepts, contrary to what Congress intended.

"Under existing law 'employer' is defined to include any person acting in the interest of an employer. The House bill changed this so as to include as an employer only persons acting as agents of an employer. This was done for the reason that the Board has on numerous occasions held an employer responsible for

the acts of . . . others although not acting within the scope of any authority from the employer, real or apparent." H.R. No. 510, 80th Cong., 1st Sess. (1947), *reprinted in* 1947 U.S.Code Cong. Service 1135, 1137. Any authority to change the agency standard lies with Congress alone. The Board previously recognized this limitation on its authority, but the present decision, by departing from the Board's longstanding "direct and immediate" control standard, has departed from Congressional intent as well.

## IV. THE BOARD'S DEPARTURE FROM ITS PREVIOUSLY SETTLED JOINT EMPLOYER PRECEDENT IN THIS CASE, ABSENT REVERSAL, WILL ADVERSELY IMPACT NUMEROUS INDUSTRIES AND HINDER BUSINESS GROWTH AND JOB CREATION

As the decade-long litigation of this case shows, the Board's expanded joint employer findings here threaten to subject countless businesses across multiple industries to unprecedented new joint-bargaining obligations and potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, among other concerns. Indeed, this unexplained change in the joint employer test potentially reaches far beyond the labor contractor relationship to impact almost every area of the American economy including user-suppliers, franchisor-franchisees, parent-subsidiaries, contractor-subcontractor, predecessor-successor and creditor-debtors.

Businesses in these and other similar relationships with other businesses

have come to rely on the NLRB's previously clear joint employer standard, which provided the certainty needed to expand and create jobs. It has thus been well understood that subcontracting allows a company to hand over auxiliary tasks to another business that specializes in those specific functions. Such arrangements promote efficiency through businesses specializing in certain tasks, reducing costs and creating new jobs. This model has worked in many secondary business functions, such as information technology, payroll, logistics, delivery, janitorial services, and landscaping. Separate employer status frees employers to focus on their core business and creates opportunities for other small businesses to prosper in "niche" roles, providing specialized services to numerous clients.

By departing from its prior bright line tests, the Board's decision will potentially reach any company who contracts with a supplier or subcontractor to produce a product or service. Businesses may find that they have unknowingly become joint employers with many suppliers. On the other hand, each service provider, or temporary staffing company, could be found unwittingly to have become a joint employer with each of its client locations. The potential number of new parties at the bargaining table could grow exponentially.

The new indirect control test thus threatens to foster bargaining instability by introducing too many conflicting interests on the employer's side of the bargaining table. Given the different parties at the bargaining table, different employers may

exercise authority over different terms and conditions of employment. One employer may set wages and hours, while another assigns work and supervises employees. The Board's new joint employer test may produce fragmented bargaining relationships that will complicate and extend negotiations.

The Board majority's failure to apply the previously required "direct and immediate control" criterion for joint employer status in this case thus has wide ranging impact. It threatens to undermine the legal relationships between millions of businesses and destabilize the commonly understood rights and responsibilities of those businesses. It draws indirectly and minimally related businesses into a confusing and complicated web of potential liability for the other company's business practices. Absent reversal, the Board's unexplained departure from its own established precedents will create a climate of uncertainty and risk that will result in the forced restructuring of many business relationships, resulting in higher costs, fewer new businesses, less growth, and fewer new jobs.

## V. CONCLUSION

For each of the reasons stated above and in Petitioner's Brief, the Petition for Review should be granted and the Board's decision should be denied enforcement.

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to FRAP 32(a)(7) that the foregoing brief contains 4276 words of proportionally-spaced 14-point type, and the word processing system used was Microsoft Word 2010.

February 2, 2016 /s/ *Maurice Baskin*

## CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2016, I electronically filed a true and correct copy of the foregoing brief using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

*/s/ Maurice Baskin*